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Supreme Court, U.S.
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No. 00-1129

In the Supreme Court of the United States

DAVID ODDI; ERIN ODDI, His Wife,
Petitioner,

v.

FORD MOTOR COMPANY, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Third Circuit Correctly Affirmed The United States District Court for the Western District of Pennsylvania in Granting Summary Judgment to Ford Motor Company and Ruling that Petitioner's Proposed Expert Testimony Was Inadmissible Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993)?

PARTIES TO THIS PROCEEDING

Petitioner

David Oddi is a private individual and has no corporate affiliations.

Respondents

Ford Motor Company and Grumman Allied Industries, Inc., Grumman Olson Bodies, Inc., and Olson Bodies, Inc.

CORPORATE DISCLOSURE STATEMENT OF FORD MOTOR COMPANY

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Ford Motor Company hereby states that it has no parent corporation and no publicly held company owns ten percent or more of Ford Motor Company's stock.

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ORDERS AND OPINIONS BELOW

Respondent, Ford Motor Company, incorporates herein by reference Petitioner's statement of the opinions below and directs this Honorable Court's attention to the Appendix of the Petition for Writ of Certiorari which contains the following opinions and orders issued below:

October 13, 2000 Court of Appeals Opinion and Judgment at Appendix to Petition for Writ of Certiorari, p. 1a;

September 16, 1999 Supplemental Memorandum on Reconsideration of the United States District Court for the Western District of Pennsylvania at Appendix to Petition for Writ of Certiorari, p. 55a;

September 1, 1999 Memorandum Order of the United States District Court for the Western District of Pennsylvania at Appendix to Petition for Writ of Certiorari, p. 68a;

March 31, 1999 Memorandum Order of the United States District Court for the Western District of Pennsylvania at Appendix to Petition for Writ of Certiorari, p. 85a.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This action arises out of a June 21, 1993 single vehicle accident which occurred on Northbound Exit 14 of Interstate 79 near Pittsburgh, Pennsylvania, when the Petitioner permitted his vehicle to drift off of the road at approximately 55-60 mph and impact with a guardrail and bridge abutment. (Appendix to Petition for Writ of Certiorari, p. 3a.) At the time of the accident, the Petitioner was operating a bread truck owned and maintained by his employer, Continental Baking Company ("Continental"). This bread truck included a 1976 special order Ford M-5000 stripped chassis which was designed and manufactured by Ford Motor Company ("Ford"). *Id.* The stripped chassis had been ordered by Continental through a Ford dealership and was an incomplete vehicle when it left the possession and control of Ford. *Id.* At that time, it was comprised only of basic component parts such as frame rails, axles, engine, drive train, wheels and a front bumper. *Id.* It did not include any aspect of the vehicle's body, floor, occupant compartment or cargo area. *Id.*

Subsequent to delivery of the stripped chassis to Continental, Continental delivered the stripped chassis to Olson Bodies, Inc., (currently known as Grumman Allied Industries and hereinafter referred to as "Grumman") for the design and manufacture of the finished vehicle including the vehicle's body, occupant compartment and cargo area. *Id.* Pursuant to Continental's specifications, Grumman then designed and manufactured all necessary aspects of the vehicle

to complete it, including the occupant compartment and floorboards. *Id.*

From 1976 through 1993, Continental used the vehicle as a bread delivery truck driving it for literally hundreds of thousands of miles. *Id.* At this juncture, it is impossible to ascertain exactly how many miles the vehicle was actually driven due to missing maintenance records and to the fact that the odometer has turned over an unknown number of times. *Id.*

The Petitioner asserted product liability claims against Ford and Grumman and, in a related action in the Court of Common Pleas of Allegheny County, Pennsylvania, Petitioner asserted negligence claims against the Commonwealth of Pennsylvania, Department of Transportation, regarding the design of the guardrails and bridge abutment in the area of the accident. *Id.*

With regard to Petitioner's claims against Ford, Petitioner asserted that the front bumper of the vehicle was defective because it allegedly bent at some point during impact with the guardrail and thereby allegedly permitted the driver's side front wheel of the vehicle to ramp onto the guardrail. *Id.*

Petitioner's accident reconstruction/design engineer, John Noettl, is a full-time consultant for litigation. Mr. Noettl has never designed a truck or front bumper for a truck. He has never published any papers or articles which relate in any way to any of his opinions in this case. Despite his prior association with various motor vehicle and highway safety organizations, he has never proposed any standard or regulation for bumpers. Nonetheless, he criticized the bumper on the subject vehicle and in a vague and general

manner indicated that the bumper should have been designed differently such that it was supported by braces and/or bracketry and therefore made more rigid. However, he has not reached any conclusions as to specifically how he contends the bumper should have been designed, nor can he say that the use of an alternative design would have changed or altered the accident sequence, as he believes it occurred. (Appendix to Petition for Writ of Certiorari; pp. 23a-29a, 43a-46a.)

More specifically, during the course of two depositions, Mr. Noettl admitted that he did not know a variety of factors central to his version of how the accident occurred and critical to any opinion that the accident would have resulted differently had an alternatively designed bumper been employed. *Id.* In this regard, he did not know: The force exerted by the vehicle on the guardrail; (*Id.*, 23a) the force the guardrail was capable of sustaining; (*Id.*, 24a) the force necessary to bend the front bumper of the vehicle as designed; (*Id.*, 24a) whether a similar vehicle with a front bumper designed with bracketry and braces as he proposes would be capable of sustaining the impact involved in the subject accident without deformation; (*Id.*, 43a-44a) the gauge, tensile strength, thickness, yield strength, width, etc. of the metal to be used in his proposed design so that it could withstand the impact at issue without deformation; (*Id.*, 25a-27a) or how his bracket design could be installed without impeding movement of the vehicle's front wheels and steering system. *Id.* Mr. Noettl did not conduct any computations, analytical analysis or testing regarding his theories in this case. *Id.*, 47a-48a. Rather, he merely rendered bold unsupported speculation.

On July 30, 1998, Ford submitted a Motion for Summary Judgment and Brief in Support to the United States

District Court for the Western District of Pennsylvania asserting that Petitioner's claims should be dismissed because Petitioner's expert failed to satisfy the *Daubert* requirements and that absent such testimony, Petitioner could not establish a *prima facie* claim. *Id.*, 87a.

The United States District Court for the Western District of Pennsylvania ruled on the summary judgment motions, ultimately granting them by Memorandum Opinion dated March 31, 1999 thereafter following the District Court's denial of Petitioner's Motion for Reconsideration (*Id.*, 55a-84a), this case was appealed to the United States Court of Appeals for the Third Circuit which properly and correctly affirmed the District Court's rulings. *Id.*, 1a-54a.

Petitioner is now seeking review of the Third Circuit's affirmance of the District Court's rulings.

ARGUMENT

I. Requirements for Certiorari

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, a Petition for Writ of Certiorari will be granted only for compelling reasons involving matters of wide spread public importance. Such issues enumerated in Rule 10 of the Rules of the Supreme Court of the United States involve conflicting decisions by the United States Courts of Appeals, conflicting decisions of the state courts of last resort involving important federal questions, issues of first impression involving important questions of federal law that have not been decided by this Court, and cases where the United States Court of Appeals or the state court of last resort has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's

supervisory power. The present case presents no such circumstances, but rather involves a routine *Daubert* ruling involving expert testimony which does not conflict with any other decisions, which does not raise any important matters of widespread public significance, and which was decided in complete conformity with the normal course of judicial proceedings. Therefore, it is respectfully submitted that this Honorable Court should deny Petitioner's request for a Writ of Certiorari.

II. Petitioner's Product Liability Crash-Worthiness Theories.

Petitioner's claims against Ford related exclusively to the alleged defective design of the front bumper of the bread truck he was operating at the time of the accident which he claimed to lack the requisite rigidity and thereby purportedly allowed the truck to ride up or "ramp" onto the guardrail and strike the bridge abutment during the accident sequence. (Appendix to Petition for Writ of Certiorari, at p. 4a.)[1] In

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[1] Petitioner has asserted that the claimed defect was the subject vehicle's "propensity to ramp up onto guardrails" (Petition for Writ of Certiorari, p. 3). However, this was not Petitioner's defect theory. In footnote 14 of its Opinion, the Third Circuit correctly noted:

> This sentence could be read as advancing a new theory of design defect—a "propensity to ramp" theory—because of the height, weight, and design of the truck. That is, it could be taken as a theory separate and apart from Noettl's defective front bumper and floor board theories. However, during his second deposition, Noettl clearly stated

support of his theory, Petitioner sought to introduce expert testimony of John Noettl who rendered opinions that the front bumper of the subject vehicle was defective because it "bent back" when it struck the guardrail. Mr. Noettl further opined that this bending back of the bumper was a defect because "it was designed with a large lever arm on the vehicle, out from the frame rail. It had holes in it for towing, which, in my opinion, would greatly weaken the structure, especially with that large lever arm on it which would allow it to be bent back." (Appendix to Petition for Writ of Certiorari, at p. 23a.) Noettl further claimed that the bumper should have been designed "with either bracketry that would go from the

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that he was not advancing any such separate theory. He testified:

Q. Alright. "Has a propensity to ramp." When you say that, you are just telling me that this is a bigger truck. And as a bigger truck, you believe that it has more of a propensity to ramp than smaller vehicles?

A. That is correct.

Q. That is all there is to it?

A. That is correct.

Q. And is that a defect?

A. No. That is not in and of itself a defect. The defects are the things we discussed. [i.e., the bumper and floor boards, discussed in a prior deposition.]

Appendix to Petition for Writ of Certiorari, p. 19a.

frame rail out to the center part of that part of the bumper, or what [he referred to] as a backing wedge." *Id.* Thus, Petitioner's claims against Ford invoked crash-worthiness theories that although the design of the front bumper did not cause the accident, it exacerbated his injuries.

Under Pennsylvania law, the term crash-worthiness relates to the protection that a motor vehicle affords its passenger against personal injury or death as a result of a motor vehicle accident. (*Id.*, p. 7a.) The Crash -Worthiness Doctrine imposes liability on the manufacturer not for causing the accident, but rather for failing to minimize the injuries or even increasing the severity of the injuries sustained in an accident brought about by a cause other than the alleged defect. *Id.* The doctrine permits a plaintiff to recover for enhanced injuries, i.e., only for those injuries he can prove he would not have sustained if he had been riding in a crash-worthy vehicle. *Id.* If enhanced injuries cannot be shown, then no liability exists as to the manufacturer. *Id.* To establish a cause of action on a theory of crash-worthiness under Pennsylvania law, a plaintiff must show: (1) the design of the product was defective; (2) an alternative, safer design that was practical existed; (3) what injuries, if any, the plaintiff would have received had the alternative design been used; and (4) the defective design caused or exacerbated specific injuries. *Id.*, at pp. 8-9.

III. The United States Court of Appeals for The Third Circuit Correctly Affirmed The District Court's *Daubert* Ruling.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), this Court expressly

imposed upon the trial judge a "gate keeping responsibility" to insure that expert testimony is both based on a reliable foundation and is relevant to the issues in the case before such testimony can even be evaluated to ascertain whether Plaintiff has made out a *prima facie* case under the applicable tort law. *Id.*, at 113 S.Ct. 2796. Because expert witnesses, unlike ordinary witnesses, may offer opinions that are not based on first-hand knowledge or observation, this Court recognized the unique potential for expert evidence to be "both powerful and quite misleading." *Id.*, at 113 S.Ct. 2798.

In *Daubert*, this Court unequivocally defined the trial court's gate keeping obligations under Federal Rule of Evidence 702, stating:

> The subject of an expert's testimony must be "scientific . . . knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds."
>
> * * *
>
> Proposed testimony must be supported by appropriate validation - i.e., "good grounds" based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Id., at 113 S.Ct. 2795. More recently, this Court has explicitly stated that the requirements of *Daubert* apply equally to experts in product liability cases, such as that at issue in this matter. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999).

The United States Court of Appeals for the Third Circuit in *In re: Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), and more recently in its opinion in this action, interpreted *Daubert* as being in accord with its basic holdings in the *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985). In this regard, the Third Circuit directed as follows:

> We now make clear that a district court should take into account all of the factors listed by either *Daubert* or *Downing* as well as any others that are relevant. Thus, the factors *Daubert* and *Downing* have already deemed important include: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subjected to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the techniques operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

Paoli, at 742, fn. 8.

The proponent of the expert testimony must do more than make a mere *prima facie* showing of the reliability of the expert testimony. *Id.*, at 743-744. To the contrary, the proponent of the expert must demonstrate by a preponderance of the evidence that the experts' opinions are reliable. *Id.*, at 744.

In the present action, Mr. Noettl has reached certain conclusions. However, when specifically questioned for the basis of those conclusions, it is readily apparent that his proposed testimony lacks sufficient reliability to be admissible pursuant to *Daubert* and its progeny.

When deposed and specifically questioned regarding various facts which logically must be ascertained to establish his opinions, Mr. Noettl conceded that he had not performed the necessary computations, analysis, or testing. In this regard, Mr. Noettl testified as follows:

> Q. Now, have you determined what force was inflicted on the guardrail at the time of initial impact with the truck?
>
> A. No, I haven't. No.
>
> Q. Have you determined what force the truck inflicted on the bridge abutment and the rail on top of the bridge abutment when it made contact with that?
>
> A. No, the reason for answering both those questions, you would have a range of variables, also, but guardrails are designed to absorb energy and

deflect vehicles. You would have to make an awful lot of assumptions.

Q. Have you determined or measured the strength or rigidity of the guardrail?

A. No.

Q. You haven't ascertained how much force it could hold; is that correct?

A. That's correct.

(Appendix to Petition for Writ of Certiorari, at pp. 23a-24a.) Mr. Noettl further testified as follows:

Q. Do you know how much force it took to bend that bumper to the point where it's bent?

A. No, I don't.

Q. Do you know how much force that bumper was capable of sustaining without bending? Have you determined that?

A. I haven't determined that, right.

Id., at 24a.

Similarly, when questioned regarding his proposed designs, Mr. Noettl testified as follows:

Q. What type of metal should the wedge be constructed from?

A. It could be the same as the bumper, if you want it to, but you just turn it on end. You could have many, many choices on that.

Q. What if you used a brace? What type of metal should that brace? What type of metal should that brace be constructed from?

A. Again, you could use the same as the bumper. Again you would have a lot of choices on that. The bracketry would probably not be as strong as the wedge. Probably not. Test it and maybe you would achieve a strength that would far exceed anything you could expect.

Q. What would the tensile strength or gauge of the metal have to be on both of those options?

A. The way you go through is look up in books and you say, "Here. We got some metal here and let's try this." Certain gauge, certain strength, something that is readily available. It's not a big thing, is what I'm trying to say. You certainly would not cut holes in it right at one of the most critical points of where your major bending

force is going to occur, which is at your railing.

Q. So this would be something relatively simple to look up in a book, and you could determine from the computations in some engineering book what you should be using. What would the name of the book be?

A. Any machine design book.

Q. Is that a particular book or is that a type of a book, machine designed book?

A. That's a type of book.

Q. Could you give me an authority?

A. There are machine design books that give you all types of metal gauges. If you go through the design process for any of these things on a bumper, frame rails, exactly what they do—they don't sit down. They don't do finite element analysis. They look up in books what metal thickness, what's our yield strength, what's our tensile properties of this metal, bang, bang, bang. We're going to use this.

Q. Have you done that?

A. No. Haven't done that, no.

Q. So you don't know what the thickness would have to be, what the metal gage, what the tensile strength-

A. Right.

Q. -What type of material you would need to use; is that correct?

A. I told you I would use—probably start with the same material that you have in the bumper. Take a piece of metal, turn it on its edge, put it in back of it, weld it on there for a test, see what strength you do gain out of this as far as impact, as far as bending moments and as far as shearing. You sure hope it won't shear off. You would do that. You would say, "I want it a little bit stronger." The easiest way, by far, is to thicken the metal. That's all you have to do. Get a lower gage metal and put that on there and try it again.

Q. How thick would the metal have to have been to have not deformed in this impact?

A. I would say, in my opinion, half inch to an inch and a half range would be more than adequate to withstand the force on edge. That's the thickness, not the width.

Q. What would the width be?

A. I don't know. Three inches or so, four inches.

Id., at pp. 25a-27a.

As the Third Circuit recognized in this case, although *Daubert* does not require a paradigm of scientific inquiry as a condition precedent to admitting expert testimony, it does require more than the haphazard, intuitive inquiry pursued by Mr. Noettl in this case. (Appendix to Petition for Writ of Certiorari, pp. 42a-43a.) The Third Circuit properly recognized that Mr. Noettl's testimony demonstrated that Petitioner could not establish the existence of Noettl's methodology and research, let alone the adequacy of it. *Id.*, 43a.

Although Mr. Noettl claims to have seen designs similar to that which he proposes on other bread trucks, he conceded that he does not know whether those similar trucks, which employ his proposed design, would have been capable of sustaining the impact at issue in this case. In this regard, Mr. Noettl testified:

Q. You don't know whether or not those trucks would have sustained a bending of the bumper the same as this truck because we don't know what the forces are, right?

A. I would say that they have a better chance, but I can't tell you more than that, no. That's correct.

Id., at pp. 43a-44a. Similarly, Mr. Noettl indicated:

Q. But, what you have seen, you don't know whether or not that would have changed the scenario in this accident one way or the other?

A. I haven't evaluated that.

Id., at p. 44a.

Further, as the Third Circuit correctly acknowledged, not only did Noettl fail to perform any analytical analysis, computation, or tests of his theory, he affirmatively failed to consider the design of the guard rail and the possibility that the design of that guardrail was a causative factor. In this regard, he testified:

Q. What if the guardrail was deformed and bent back by the force of the impact so it was bent to the point where it was lower than the bumper? Could a ride up occur then?

A. If it was bent back further than the bumper's height?

Q. If it was bent back and, therefore, it was lower than the height of the bumper, could it ride up?

A. It's possible. I haven't thought of it, and how long. I would have to look at that. If you, your tire is exposed to ramping—

Q. If you have the bumper and the guardrail here and the guardrail bends down to a point lower than the bumper, the tire could ride up on it, isn't that correct?

A. That is a possibility, yes.

Id., at pp. 44a-45a. Finally, the Third Circuit recognized that Noettl conceded that strengthening the bumper and making it more rigid could result in even greater injury because it would transmit more force to the driver of the truck than did the design of the bumper actually employed. In this regard, Noettl testified:

Q. To get back to my question, would the energy—if you had a rigid bumper, on impact, the energy of the impact and force of the impact would be transferred to the occupants, right?

A. Some of it would, yes.

Q. More of it would than if you had a bumper that had give to it?

A. Right.

Id., at pp. 45a-46a.

Contrary to Petitioner's assertions, neither the ruling of the District Court, nor the decision of the Third Circuit imposes an obligation upon him to perform actual crash testing. Quite to the contrary, both of these Courts ruled that Noettl's testimony failed to satisfy *Daubert* because he

performed no analytical analysis, no computations, relied on no authorities, and therefore had absolutely no basis for his opinions aside from his own subjective beliefs. In this regard, the District Court held:

> As Noettl's statements demonstrate, he did no testing of any evidence. He identified no specific treatises, articles, or written authorities on any issue. He performed no calculations. He used no models or computer simulations. Instead to support his opinion, he relied on his experience and training. His curriculum vitae shows considerable experience and training in the area about which he seeks to testify . . . and defendants do not challenge his qualifications. The issue is whether Oddi has sufficient evidence that Noettl brought those qualifications to bear on the particular problems of this case.
>
> We find that he has not. We need not measure his adherence to any of the *Daubert*-related factors identified by the Third Circuit because he satisfies none of them. He has not rendered an opinion like the one found in *Kumho*, where there was at least a particular methodology about tire failure to examine. Reduced to its essence, Noettl's theory is that the bumper and floor should have been made stronger, by using thicker metal or reinforcement. The absence of reviewable study, measurement, calculation, or reference accompanying these conclusions is sufficient to render them unreliable.

(Petitioner's Appendix at pp. 103a-104a.)

Similarly, the Third Circuit explicitly stated:

> Nor does our holding suggest that every plaintiff must engage in such sophisticated and refined testing (including crash-testing) as to preclude a successful suit for damages for all but the wealthiest of plaintiffs or a group of plaintiffs sufficiently large to allow the economies and practicalities of class certification. The inquiry required under *Daubert* ought not to become an impenetrable barrier for plaintiffs with limited resources or restricted circumstances. As noted above, the Supreme Court reminds us that the "inquiry envisioned by Rule 702 is . . . a flexible one" . . .. It does not require the most elaborate or sophisticated tests or studies that can be imagined by opposing counsel. Nevertheless, here, the District Court's inquiry established that Oddi's proffered expert testimony was not admissible under Fed. R. Evid. 702, and we conclude that the District Court did not abuse its discretion in rejecting that evidence.

Id., p. 52a.

Petitioner appears to assert that the Third Circuit's decision in this case is in conflict with its prior decision in *Kannankeril v. Terminix International, Inc.*, 128 F.3d 802 (3d Cir. 1997). However, when *Kannankeril* is carefully reviewed, it is clear that there is no conflict in the Third Circuit's decisions. *Kannankeril* involved expert testimony on a causation issue in which the plaintiff's expert rendered

opinions that the insecticide spray applied by the defendant had caused certain personal injuries to the plaintiff. Plaintiff's expert had employed a differential diagnosis analysis to the causation issue. The Third Circuit recognized that this theory (differential diagnosis) is well established and generally accepted in the medical profession. Although the plaintiff's expert in *Kannankeril* did not personally perform the underlying medical tests upon which his differential diagnosis was based, he relied upon the plaintiff's treating physicians and health care providers' reports and test results in formulating his opinions. The Third Circuit recognized that this is a well established and generally accepted methodology in the medical community. There is no rationale or holding in *Kannankeril* which conflicts with any aspect of the Third Circuit's decision in the present action.

In the present case, unlike *Kannankeril*, Petitioner's expert followed no methodology and performed no analysis or computations. All Mr. Noettl has asserted are his own subjective beliefs without any supporting basis. Thus, the Third Circuit properly affirmed the District Court's exclusion of Mr. Noettl under *Daubert*. This is precisely the type of testimony which *Daubert* and its progeny are aimed at precluding.

CONCLUSION

Based upon the foregoing facts, authorities, and arguments, it is respectfully submitted that this Honorable Court should deny Petitioner's request for Writ of Certiorari.

Respectfully submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.

/s/_____

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